

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAR 23 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0406-PR
)	DEPARTMENT A
Petitioner,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MICHAEL MERINO,)	the Supreme Court
)	
Respondent.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT
OF GREENLEE COUNTY

Cause Nos. CR-2009010, CR-2009039, and CR-2009041 (Consolidated)

Honorable Monica Stauffer, Judge

REVIEW GRANTED; RELIEF GRANTED

Derek D. Rapier, Greenlee County Attorney
By Michael W. McCarthy

Clifton
Attorneys for Petitioner

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By Christopher Stavris

Scottsdale
Attorneys for Respondent

H O W A R D, Chief Judge.

¶1 Respondent Michael Merino pled guilty to one count of possession of drug paraphernalia, one count of possession or use of a dangerous drug, and one count of

assault. The trial court placed him on consecutive terms of probation, totaling ten years. Merino sought relief pursuant to Rule 32, Ariz. R. Crim. P., claiming the imposition of consecutive terms of probation was illegal. The trial court agreed and granted Merino's petition for post-conviction relief. The state then filed a petition for review in this court challenging the trial court's ruling.

¶2 The state argues that Merino's originally imposed consecutive terms of probation were legal and therefore claims the trial court erred in granting Merino's petition for post-conviction relief. We will not disturb the trial court's grant of post-conviction relief absent a clear abuse of the court's discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). An error of law is an abuse of discretion. *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶3 This court recently addressed this very issue in *State v. Bowsher*, 223 Ariz. 177, 221 P.3d 368 (App. 2009).¹ Relying on our supreme court's decision in *State v. Pakula*, 113 Ariz. 122, 124-25, 547 P.2d 476, 478-79 (1976), which held that a defendant charged with multiple counts in the same information could not be placed on consecutive terms of probation, the defendant in *Bowsher* claimed that imposition of consecutive terms of probation was illegal. 223 Ariz. 177, ¶ 4, 221 P.3d at 368. Citing *State v. Jones*, 124 Ariz. 24, 601 P.2d 1060 (1979), however, the *Bowsher* court disagreed and recognized that the court's holding in *Pakula* "must necessarily 'be strictly limited to cases wherein there is one indictment involving multiple counts'" and did not

¹The state and Merino both assert *Bowsher* is not controlling in this case because it was issued as an unpublished memorandum decision. *Bowsher* was later published as an opinion, however, and is therefore legal precedent.

prohibit the imposition of consecutive terms of probation for unrelated convictions charged in separate indictments or informations. *Bowsher*, 223 Ariz. 177, ¶ 8, 221 P.3d at 369, *quoting Jones*, 124 Ariz. at 26, 601 P.2d at 1062.

¶4 Merino pled guilty to three distinct offenses, each occurring on a different date and each charged in a different indictment. Accordingly, pursuant to *Bowsher*, the trial court was permitted to impose consecutive terms of probation. *See* 223 Ariz. 177, ¶ 8, 221 P.3d at 368. The trial court therefore abused its discretion in granting Merino's petition for post-conviction relief challenging his consecutive probationary terms. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948. We therefore grant the petition for review and also grant relief. The trial court's order granting relief is reversed, and the consecutive terms of probation are reinstated.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge